Mailed: January 29, 2004
Paper No. 12
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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Microbrush Corporation

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Serial No. 76120194
Serial No. 76290053

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Eric P. Schellin of Schellin & Associates, Ltd. for Microbrush Corporation.

Marlene Bell, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

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Before Cissel, Chapman and Bucher, Administrative Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

The two applications involved herein were filed on August 30, 2000 and July 24, 2001, respectively, by Microbrush Corporation (a Wisconsin corporation) to register on the Principal Register the marks FLOW THRU for goods amended to read “applicator of liquid to the surfaces of teeth” in International Class 10 (application Serial No. 76120194), and FLOWTHRU for goods amended to read “dental

applicators for applying a treatment liquid medicament to the surface of teeth" in International Class 10 (application Serial No. 76290053). Applicant asserts, in each application, a bona fide intention to use the mark in commerce.

The Examining Attorney has refused registration in each application under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark (FLOW THRU or FLOWTHRU), when used on applicant's identified goods, would be likely to cause confusion, mistake or deception with the registered mark FLOW-THRU-HEAD for "dental posts" in International Class 10.[1]

When the refusal to register was made final, applicant appealed in each application. Applicant and the Examining Attorney have filed briefs, but applicant did not request an oral hearing.

In view of the common questions of law and fact which are involved in these two applications, and in the interests of judicial economy, we have consolidated the applications for purposes of final decision. Thus, we have issued this single opinion.

[1] Registration No. 1964508, issued March 26, 1996, Section 8 affidavit accepted, Section 15 affidavit acknowledged.

We affirm the refusals to register. In reaching this conclusion, we have followed the guidance of the Court in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, In re Majestic Distilling Company, Inc., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

The Examining Attorney contends that each of applicant's marks (FLOW THRU and FLOWTHRU) is very similar to the registered mark FLOW-THRU-HEAD, as all of the marks use the identical words "FLOW" and "THRU," and applicant's deletion of the hyphens and the word "HEAD" does not sufficiently distinguish applicant's marks from registrant's mark to avoid confusion; that each of applicant's marks is similar in sound, appearance, connotation and overall commercial impression to the cited registered mark; that the goods are closely related as they are dental products, which would be marketed in the same channels of trade in the dental field; and that doubt must

be resolved in favor of registrant. In application Serial No. 76120194, the Examining Attorney submitted printouts of a few pages from the "www.trdental.com" web site (TR-Dental Supplies) showing that that company offers both Microbrushes Disposable Applicators and SB Posts (stainless steel dental posts). The Examining Attorney requested, in her brief on appeal in each application, that the Board take judicial notice of The American Heritage Dictionary definition of "head" as "17.c. The working end of a tool or implement. … 21. The uppermost part; the top." The Examining Attorney's request is granted. See TBMP §704.12(a) (2d ed. June 2003).[2]

Applicant contends that the marks are different; that applicant's goods and the cited registrant's goods are "vastly different" (application Serial No. 76120194 brief, p. 1) and "very different" (application Serial No. 76120194 brief, p. 2); and that the respective goods travel through distinct channels of trade to different consumers, with registrant's goods offered only to dentists, while applicant's goods are sold to anyone requiring a small

[2] Also, in each application, the Examining Attorney submitted copies of third-party registrations for the first time with her appeal brief. These are untimely and were not considered. See Trademark Rule 2.142(d). The fact that in each application the Examining Attorney had previously referenced a search she made does not make the actual third-party registrations of record.

applicator to deposit a small amount of liquid on a surface, including hobbyists, horological experts, artists, machinists and dentists.[3]

Turning first to a consideration of the cited mark and each of applicant's marks, we find that they are very similar in sound, appearance, connotation and commercial impression. All of the involved marks consist of the words "FLOW," "THRU" and registrant's mark includes nondistinctive hyphens and the descriptive word "HEAD" referring to the working end of a tool. The minor differences are not likely to be recalled by purchasers seeing the marks at separate times. Under actual market conditions, consumers do not have the luxury of a side-by-side comparison of the marks; and further, we must consider the recollection of the average purchaser, who normally retains a general, rather than a specific, impression of the many trademarks encountered. Thus, the purchaser's fallibility of memory over a period of time must also be

[3] In applicant's appeal brief in application Serial No. 76290053, applicant requested that judicial notice "be taken of the fact that dental posts cost thousands of dollars while the liquid applicators of the applicant cost only pennies and are designed to be disposable." Inasmuch as this is not proper material for judicial notice, applicant's request is denied. See TBMP §704.12(a) (2d ed. June 2003). We note that both applications are based on applicant's assertion of a bona fide intention to use the marks in commerce, and therefore there are no specimens of record. Moreover, applicant has offered no informational material regarding its own goods in either application.

kept in mind. See Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); and Spoons Restaurants Inc. v. Morrison Inc., 23 USPQ2d 1735 (TTAB 1991), aff'd unpub'd (Fed. Cir., June 5, 1992).

Applicant's marks and the registered mark are highly similar in connotation, all connoting the ease with which bonding agents or other involved materials will move through applicant's applicators or around the top of registrant's dental posts.

Turning next to a consideration of the respective goods, it is well settled that goods need not be identical or even competitive to support a finding of likelihood of confusion; it being sufficient that the goods are related in some manner or that the circumstances surrounding their marketing are such that they would likely be encountered by the same persons under circumstances that could give rise to the mistaken belief that they emanate from or are associated with the same source. See In re Peebles Inc., 23 USPQ2d 1795, 1796 (TTAB 1992); and In re International Telephone and Telegraph Corporation, 197 USPQ 910 (TTAB 1978).

It has been repeatedly held that, when evaluating the issue of likelihood of confusion in Board proceedings regarding the registrability of marks, the Board is

constrained to compare the goods as identified in the application with the goods as identified in the registration. See Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and Canadian Imperial Bank of Commerce, N. A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

In this case, the registered mark is for "dental posts," while applicant intends to offer "applicator of liquid to the surfaces of teeth" (application Serial No. 76120194), and "dental applicators for applying a treatment liquid medicament to the surface of teeth" (application Serial No. 76290053). The Examining Attorney's submission of printouts of pages from the web site of a dental supply company showing it offers both products is persuasive that these goods, as identified, are related. In fact, the evidence placed in the record by the Examining Attorney shows that applicators are used by dentists to apply bonding agents. Contrary to applicant's suggestions, there is no evidence in the record clarifying whether or not a dental post may itself be cemented into position inside the tooth.

Applicant argues in application Serial No. 76290053 that the present refusal to register is the result of "a

failure of the classification system" that brought the involved goods into juxtaposition in International Class 10 (brief, p. 1); and stated another way, that "it is only the unfortunate happenstance of a limiting classification system which brings the registrant's product and the applicant's applicator into tortured juxtaposition" (applicant's September 18, 2002 response). We disagree that it is the classification system; rather, it is applicant's identifications of goods which limit its goods for registration purposes to applicators for dental uses.

While applicant contends that the trade channels are different in that applicant sells applicators for a wide array of uses (e.g., hobbyists, artists, machinists) in addition to uses for dentists, those other uses are not relevant in light of applicant's identifications of goods, which are both clearly limited to dental uses.

We find the respective goods are closely related, and could be sold through the same channels of trade, to the same classes of purchasers, which include dentists.

Even if the consumers in the dental field are relatively sophisticated, they are likely to believe that the parties' respective goods come from the same source, if offered under the involved substantially similar marks. See Weiss Associates Inc. v. HRL Associates Inc., 902 F.2d

1546, 14 USPQ2d 1840 (Fed. Cir. 1990); and Aries Systems Corp. v. World Book Inc., 23 USPQ2d 1742, footnote 17 (TTAB 1992).

Decision: The refusal to register under Section 2(d) is affirmed in each application.